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JAMES H. McKENNEY,
Clerk

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 142.

THE UNITED STATES, APPELLANT,

vs.

EVETT D. NIX.

AND

No. 195.

EVETT D. NIX, APPELLANT,

vs.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR EVETT D. NIX IN REPLY TO THE BRIEF FOR THE UNITED STATES.

FRANK B. CROSTHWAITE,
For Cross-appellant.

FRANKLIN H. MACKEY,
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Brief for Evett D. Nix in Reply to the Brief for the United States.

In replying to the brief for the United States, we desire to call the attention of the court to a controlling circumstance affecting each of the items of the claimant's account, a circumstance which does not seem to be taken cognizance

of by the learned counsel for the Government, namely, that the act of May 2, 1890, cited in our principal brief as the organic act of the Territory of Oklahoma (26 Stats., 81), in express terms makes the fee bill for United States marshals, as it is found in section 829 of the Revised Statutes, the fee bill for the marshals of Oklahoma. That act, after providing for the creation of the Territory of Oklahoma from part of the Indian Territory, vests the judicial power of the new Territory in "a supreme court, district courts, probate courts, and justices of the peace." It divides the Territory into judicial districts and provides that "a district court shall be held in each county in said district thereof * * * and each of said district courts shall have and exercise, exclusive of any court heretofore established, the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the circuit and district courts of the United States." Appeals and writs of error are given from these district courts to the supreme court of the Territory, and from the latter court to the Supreme Court of the United States. Section 13 of the same act then provides that "there shall be appointed a person learned in the law, who shall act as attorney for the United States, who shall hold his office for four years and until his successor shall be appointed," &c.; also that "there shall be appointed a *marshal* for said Territory, who shall hold his office for four years and until his successor shall be appointed," &c. It then declares that "there shall be allowed to the attorney, *marshal*, clerks of the supreme and district courts *the same fees* as are prescribed for similar services by such persons in chapter sixteen, title Judiciary, of the Revised Statutes of the United States." This chapter includes section 829—the fee bill for United States marshals; thus making this section of the Revised Statutes a part of the organic act of the Territory. If, therefore, our contention as to this section be well founded (as we contend it is), then *every item* of the claimant's account should be allowed without further question,

for they are each and all of them made up and charged for according to the provisions of section 829 of the Revised Statutes, as the same was put in force and made a part of the organic act of Oklahoma on the 2d of May, 1890.

We now proceed to reply seriatim to the contention of the learned counsel for the United States in respect of the several items in controversy upon the appeal and cross-appeal.

Item 2—$69.18 (Rec., 3).

It is contended by the Government as to this item that by the 25th clause of section 829, Revised Statutes, "the mileage is to be computed not for the distance which the marshal *may find it necessary to travel* in going to serve the process, but is to be computed from the place where the process is returned to the place of service." We submit that this contention cannot be upheld. The act of 1875 (18 Stats., 333, ch. 95, §§ 1, 7), which provides for the allowance of mileage to clerks, marshals, &c., for travel "necessarily performed," throws some light upon the subject if any further light be needed, for we insist that the word "travel" in this clause of section 829 is to be construed as meaning "necessary travel." (See Gould's Notes to Revised Statutes, vol. 1, p. 248, and for these sections of the act of 1875 see *ibid.*, p. 243.) The finding of fact by the Court of Claims as to this item declares that "the defendants were moving about from place to place to avoid arrest, and it was NECESSARY *to travel a circuitous route.*" Nor does the act of 1894 (28 Stat., 372), even supposing it to supersede the special provisions of the Oklahoma organic act, in any way change this provision as to travel "*necessarily* performed," as claimed by the learned counsel. That act, after making provisions for their pay, annexed a proviso that "hereafter no marshal or deputy marshal be allowed more than one mileage for each mile *actually and necessarily* performed," showing that when "actually and necessarily performed" the mileage should

be allowed; and that was all that the court below did in the case at bar. It found that this travel had been "actually and necessarily performed," and consequently allowed this item.

Item 10—$100 (Rec., 4).

This item is conceded us in the defendant's brief. In addition to the holding by this court, as expressed in the headnote to the case of United States *vs.* Pitman, 147 U. S., 669, viz., "Marshals are entitled to per diem fees for attendance when attending under sections 583, 584, 671, and 2013, Revised Statutes, the same as if the judge were present and business were transacted," and the like ruling in United States *vs.* Finnell, 185 U. S., 236; a similar ruling was made in United States *vs.* Aldrich, 58 Fed. Rep., 668.

Item 12—$5,135.50 (Rec., 4).

We come now to consider the position taken by the defendant as to this item. We submit that it is entirely untenable. Apart from our contention, upon general principles, in our main brief, that the provisions of the Oklahoma organic act upon this subject are special provisions and cannot be held to be repealed by any subsequent general act of Congress unless the Territory of Oklahoma be expressly mentioned therein, we submit that the contention by the learned counsel for the defendant that the fees of the marshal for serving warrants are to be paid for in one manner if the arrest be made for an offense against the Territory, and in another if against the United States, and that the marshal or his deputy is to carry the prisoner in one direction or another, according as the offense for which he is arrested is against the Territory or the United States, finds no support from the statute itself. The statute makes no distinction whatever. On the contrary, it declares that "persons charged with *any* offense or crime [whether the

same be against the Territory or the United States], for whose arrest a warrant has been issued, may be arrested by the United States marshal or any of his deputies wherever found in such Territory, but in *all* such cases [not in any particular class of cases, as contended for by defendant's counsel], the accused *shall* be taken for preliminary examination before a United States commissioner or a justice of the peace *whose office is nearest to the place where the offense or crime was committed.*"

That is to say, that whenever the accused is arrested "*by the United States marshal or any of his deputies*" he shall in *all such cases* be taken, &c. This, therefore, is an express special provision for the marshals for the Territory of Oklahoma, and it cannot be said to be overruled by the general provision of a later act unless that Territory is in terms expressly included.

In addition, however, to the rule of law that a special statute is not to be considered as repealed by a general statute, there is an express provision of the organic act which controls this question. By section 28 thereof it is declared that "the Constitution and all the laws of the United States not locally inapplicable shall, *except so far as modified by this act*, have the same force and effect as elsewhere within the United States." So that the general act of 1894 must be considered as modified by the Oklahoma provision, so far as that Territory is concerned.

Lastly, even if we consider the question as if this provision of the organic act had never been passed and regard the act of 1894 as controlling the subject, yet even by that later statute these fees must be allowed, for the act of 1894 declares that after the arrest has been made the marshal shall take the defendant before the nearest circuit court commissioner or the nearest judicial officer *having jurisdiction under existing laws for a hearing, commitment, or taking bail for trial.* Now, it has been held by Judge McAtee in the case printed in the appendix to our principal brief that the commissioner

or judicial officer having exclusive jurisdiction to hear, commit to bail, &c., is the commissioner or judicial officer nearest the place where the crime was committed. Had, therefore, the marshal taken the prisoners to the commissioner or judicial officer nearest the place where the arrest was made, that officer would have had no jurisdiction to commit the prisoners.

Item 24—$90.50 (Rec., 4).

This item, it is contended by the Government, cannot be allowed, because the prisoner "escaped from the custody of the deputy marshal;" but it should not be lost sight of that but for the interference of the Government itself at Springfield, Ohio, in detaining the prisoner "as a witness for the United States in a counterfeiting case," the deputy marshal might not have "arrived in New York city *too late* for the prisoner to be received at the Brooklyn penitentiary on the day of arrival in New York." It was in consequence of that late arrival that "he escaped from the custody of the deputy on the night of the same day." Nowhere does it appear that the deputy was negligent in his duty whereby the prisoner escaped, but the finding of fact does show affirmatively that he "made every effort to retake the prisoner." It is submitted that the district judge's allowance of this item (which is a charge for actual expenses only) is *prima facie* evidence of the fact that the escape of the prisoner was not due to any negligent performance of his duties by the marshal, otherwise the district judge, who must be presumed to have satisfied himself of the fact, would not have allowed the item.

Respectfully submitted.

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